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No. 88-1440

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

RONALD and FRANCES GAJKOWSKI, ROBERT SCHIPSKE and WILLIAM and JEAN ABATE,
Petitioners

v.

HIGHWAY TRUCK DRIVERS AND HELPERS LOCAL UNION NO. 107,
Respondent

On Petition for Writ of Certiorari to the Pennsylvania Supreme Court

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BRIEF IN OPPOSITION

THOMAS W. JENNINGS
Counsel of Record
WILLIAM J. EINHORN
SAGOT & JENNINGS
11th Floor
Public Ledger Building
Philadelphia, PA 19106
(215) 351-0612
Attorneys for Respondent

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether there could be any deprivation of property without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States merely because the Pennsylvania Supreme Court exercised its express and inherent authority to reconsider and subsequently withdraw a prior opinion particularly where the facts demonstrate that Petitioners never had a final judgment under Pennsylvania law?

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BRIEF IN OPPOSITION

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pennsylvania Constitution, Article I, § 11:

> Sec. 11. Courts to be open; suits against the Commonwealth
>
> All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or

delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

Pennsylvania Judicial Code, 42 Pa.C.S.A. § 726:

Extraordinary jurisdiction

Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or district justice of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done.

Rule 105, Pennsylvania Rules of Appellate Procedure:

(a) Liberal Construction and Modification of Rules. These rules shall be liberally construed to secure the just, speedy and inexpensive determination of every matter to which they are applicable. In the interest of expediting decision, or for other good cause shown, an appellate court may, except as otherwise provided in Subdivision (b) of this rule, disregard the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

(b) Enlargement of Time. An appellate court for good cause shown may upon application enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance of appeal, a petition for permission to appeal, or a petition for review.

Rule 128, Pennsylvania Rules of Civil Procedure:

In ascertaining the intention of the Supreme Court in the promulgation of a rule, the courts may be guided by the following presumptions among others:

(a) That the Supreme Court does not intend a result that is absurd, impossible of execution or unreasonable;

(b) That the Supreme Court intends the entire rule or chapter of rules to be effective and certain;

(c) That the Supreme Court does not intend to violate the Constitution of the United States or of this Commonwealth;

(d) That if the Supreme Court has construed the language used in a rule or statute, the Supreme Court in promulgating a rule on the same subject matter which employs the same language intends the same construction to be placed upon such language;

(e) That the Supreme Court intends to favor the public interest as against any private interest;

(f) That no rule shall be construed to confer a right to trial by jury where such right does not otherwise exist.

COUNTER-STATEMENT OF THE CASE

On November 19, 1979, approximately 500 employees of Minnesota Mining and Manufacturing Company in Bristol, Pennsylvania, who were represented for purposes of collective bargaining by Respondent, commenced a lawful, economic strike against their employer. For the next ten weeks, these employees continuously maintained a peaceful picket line at 3M's facility for 24 hours a day, seven days a week. In the evening of January 25, 1980, this peace was broken suddenly and without warning when one of Respondent's rank and file members shot two fellow members (Gajkowski and Schipske), as well as a 3M security guard (Abate), all of whom then happened to be congregated at or near the picketing site.

Three Complaints in Trespass were filed in June, 1980 in the Court of Common Pleas of Bucks County, Pennsylvania against two labor organizations—the Respondent and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. In those actions, which were later consolidated, money damages were sought to redress personal injuries sustained by three of the Petitioners. Actions were also filed by the spouses of two of the Petitioners for asserted losses of consortium. Their claims were tried to a jury which returned a verdict finding Respondent and the IBT jointly and severally liable to Petitioners and awarding damages aggregating $1.3 Million.[1]

Thereafter, timely post-trial motions were filed by the Respondent and the IBT seeking judgment notwithstanding the verdict or, in the alternative, for arrest of judgment, or in the alternative, for a new trial. By Opinion and Order dated September 5, 1984, a three judge panel of the trial court denied the post-trial motions and molded the jury verdicts to reflect the findings of comparative negligence and an award of delay damages[2] for a total judgment of $1,537,437.96.

Both the IBT and Respondent filed timely appeals to the Superior Court of Pennsylvania on September 25, 1984. That court, on January 28, 1986 issued an Opinion and Order reversing the trial court and entering judgments N.O.V. in favor of both the IBT and Respondent.

Thereafter, Petitioners filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court which was ultimately granted in October, 1986. After the mat-

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[1] Petitioners Ronald Gajkowski and Robert Schipske were found to be 20% comparatively negligent and their verdicts were reduced accordingly.

[2] Delay damages were awarded pursuant to Rule 238 of the Pennsylvania Rules of Civil Procedure in effect at that time.

ter was briefed and argued before the Pennsylvania Supreme Court, that court, on August 31, 1987 issued a Judgment and Opinion reversing, by a four-three vote, the Superior Court's ruling as to Respondent, but affirmed as to the IBT. Respondent then filed an Application for Reargument Pursuant to Rule 2542 of the Pennsylvania Rules of Appellate Procedure which was denied by the Pennsylvania Supreme Court on October 9, 1987. Notification of the denial of reargument was issued by the Prothonotary on October 14, 1987, but was mailed to Respondent's counsel at an improper address. Respondent did not learn of the denial of the reargument application until several days later.

On October 16, 1987, Respondent filed a voluntary petition under Chapter 11 of the Bankrupcty Code with the United States Bankruptcy Court for the Eastern District of Pennsylvania. On October 22, 1987, a Suggestion of Bankruptcy was filed with the Pennsylvania Supreme Court.

While the record remained with the Pennsylvania Supreme Court, and thus the pendency of the matter continued in that court, Respondent petitioned that court to modify its judgment to remand the matter to the Pennsylvania Superior Court to adjudicate issues raised by Respondent on appeal, but never reached by either the Pennsylvania Superior or Supreme Courts. Further, and in order to preserve its appellate rights within the state judicial system, on November 2, 1987, Respondent filed an application styled "Application for Reconsideration Nunc Pro Tunc of the Denial of Application of Appellee Highway Truck Drivers and Helpers Local 107 for Reargument." The latter application was granted on November 18, 1987 by the Pennsylvania Supreme Court, which by separate Order of the same date, denied the Application for Modification of Judgment as "moot." Reargument of the matter was scheduled for April 12, 1988.

Given an unintentional and inadvertent violation of the automatic stay provisions of 11 U.S.C. § 362(a), Respondent sought relief, *nunc pro tunc*, through the Bankruptcy Court from the automatic stay in order to proceed with the reargument before the Pennsylvania Supreme Court. On March 29, 1988, the Bankruptcy Court ruled that the automatic stay rendered null and void Respondent's "Application for Reconsideration *Nunc Pro Tunc*." However, the court lifted the automatic stay prospectively as to both Respondent and Petitioners.

To cure its unintentional violation of the automatic stay, Respondent filed an amended application styled "Amended Application for Reconsideration Nunc Pro Tunc of Denial of Application of Appellee Highway Truck Drivers and Helpers Local Union No. 107 for Reargument Prepared In Accordance With The March 29, 1988 Order of the Honorable Bruce Fox, U.S. Bankruptcy Court for the Eastern District of Pennsylvania." The Pennsylvania Supreme Court granted the amended application on April 7 and confirmed that the reargument would go forward as scheduled on April 12, 1988.

On September 28, 1988, the Pennsylvania Supreme Court announced its decision in the case of *Gajkowski v. International Brotherhood of Teamsters*, —— Pa. ——, 548 A.2d 533 (1988). Justice Papadakos, who had been a member of the four-three majority which originally reversed the Pennsylvania Superior Court and reinstated the jury award as against Respondent, wrote for a new four-three majority of the Court withdrawing that Court's first Opinion reported at 515 Pa. 516, 530 A.2d 853 (1987). In its September 28, 1988 decision, and after giving a detailed explanation of the authority upon which it could review the matter, the majority of the Pennsylvania Supreme Court determined that the court's prior Opinion ". . . was in effect a repudiation of legislative intent and a removal of the limited liability which the Pennsylvania Labor Anti-Injunction Act [43 P.S. § 206h]

was intended to cloak labor unions with in furtherance of the legislative policy of protecting the labor movement." 548 A.2d at 534.[3] The majority concluded that the court had unintentionally and inadvertently employed doctrines of *respondeat superior* and vicarious liability in a situation where the Pennsylvania Legislature had expressly forbidden their application. It was this "blatant error" that caused the court to take ". . . the extraordinary step . . . of granting the Application for Reconsideration *Nunc Pro Tunc* as well as the Amended Application *Nunc Pro Tunc*." 548 A.2d at 541.

Petitioners thereafter filed an Application for Reconsideration and Reargument of the September 28, 1988 Opinion and Order of the Pennsylvania Supreme Court. That Application was denied by that court on December 1, 1988. Petitioners now seek a writ of certiorari to review the Order of the Pennsylvania Supreme Court. Respondent opposes Petitioner's Application.

REASONS WHY THE PETITION SHOULD BE DENIED

I. This Court Has Long Recognized That A Litigant Is Not Deprived Of Due Process Where A Court Has Exercised Its Inherent Power To Reopen Even A Final Judgment.

This Court has long held that the Due Process clause of the Fourteenth Amendment does not grant to a litigant any vested right to a particular rule of procedure, *American Tool Bridge Co. v. Railroad Comm.*, 307 U.S. 486 (1938), or judicial decision, *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 450 (1924). The Due Process clause only

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[3] Section 8 of the Pennsylvania Labor Anti-Injunction Act, 42 P.S. § 206h, sets forth a standard of limited liability of labor organizations and employer associations for unlawful acts of their officers, agents or members occurring during the course of a labor dispute. It was patterned after the federal Norris-LaGuardia Act, 29 U.S.C. §§ 101-115. *Philadelphia Marine Trade Association v. National Longshoremen's Association*, 453 Pa. 43, 308 A.2d 98 (1973).

assures notice and an opportunity to argue the merits under procedures established by a state and its courts. *Simon v. Craft*, 182 U.S. 427, 436 (1901).

Nor does the Federal Constitution regulate the details, variance or error in the application of state rules. *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 547 (1949); *Neblett v. Carpenter*, 305 U.S. 297, 302 (1938). Indeed, in *Iowa Central Ry. v. Iowa*, 160 U.S. 389 (1896), this Court specifically rejected an attempt to regulate a state court's use of summary procedures through the Due Process clause.

The basic rights of notice and hearing on the merits indisputably had been provided by the Pennsylvania Supreme Court to the Petitioners in the matter now before this Court. Petitioners do not claim that they had no notice or opportunity to argue the merits before that court. The absence of such a deprivation defeats Petitioners' claim.

Further, the right of a court to reopen even a final judgment for cause is ancient and inherent. It existed in the common law writs of *coram nobis* and *audita querela*, both of which were extant at the time the Due Process clause was written. *See generally* 7 Am. Jur. 2d *Audita Querela* (1980); 18 Am. Jur. 2d *Coram Nobis and Allied Statutory Remedies* (1985); and 46 Am. Jur. 2d *Judgments* §§ 792-882 (1969) (esp. § 811 *Mistakes*).

The practice exists today in the federal system under the Federal Rules of Civil Procedure. *See* Rule 60, Federal Rules of Civil Procedure and accompanying notes. *See also American Iron and Steel Institute v. E.P.A.*, 560 F.2d 589, 592-600 (3d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978) (court of appeals had the power to recall its mandate two years after its issuance).

The procedure exists as well in Pennsylvania. Article I, § 11 of the Pennsylvania Constitution contains an "open courts" provision which guarantees that each

litigant shall have access to the courts to pursue every appropriate "remedy by due course of law" and to insure that "right and justice [are] administered without sale, denial or delay." The Pennsylvania Legislature implemented this constitutional provision by its passage of the Pennsylvania Judicial Code, 42 Pa. C.S.A. § 726. Therein, the Pennsylvania Supreme Court is empowered to assume plenary jurisdiction over any matter pending before any court or district justice of the Commonwealth of Pennsylvania and enter any appropriate order. The intent of these constitutional and statutory provisions is further codified within the rules of procedure governing Pennsylvania courts. *See e.g.*, Rule 105, Pennsylvania Rules of Appellate Procedure and Rule 126, Pennsylvania Rules of Civil Procedure. The traditional and customary nature of these procedures is sufficient to quiet due process objections. *Anderson National Bank v. Luckett*, 321 U.S. 233, 244 (1944).

II. The Pennsylvania Supreme Court's Conclusion That It Had The Power Under The Pennsylvania Rules Of Appellate Procedure To Withdraw The Opinion Of August 31, 1987 Is Binding Upon This Court For Purposes Of Determining The Existence Of A Property Interest Under The Due Process Clause.

In *Bishop v. Wood*, 426 U.S. 341 (1976), this Court set forth the basis upon which it would determine whether a state statute or a similar legal provision created a property interest protected by the Fourteenth Amendment. The Plaintiff in *Bishop* was a municipal police officer who had been discharged without a hearing. He maintained that his termination violated the Fourteenth Amendment by depriving him of a property interest in continued employment which allegedly arose from a particular municipal ordinance. According to the *Bishop* plaintiff, this ordinance gave him a justifiable expectation that he could not be discharged for any reason other than those specifically set forth in the ordinance.

He further reasoned that his justifiable expectation constituted "property" which could not be divested absent due process. This Court disagreed.

Writing for the Court, Justice Stevens began with the proposition that "the sufficiency of the claim of entitlement must be decided by reference to state law." 426 U.S. at 344. Justice Stevens conceded that "[o]n its face, the ordinance on which [plaintiff] relies may fairly be read as conferring such a guarantee [of continued employment]." This Court, however, would not act upon a facial reading of the ordinance, but rather looked to governing judicial authority. Significantly, Justice Stevens observed that, "[w]e do not have any authoritative interpretation of this ordinance by a North Carolina state court." 426 U.S. at 341. In the absence of such an "authoritative" construction, this Court relied upon the interpretation of the lower federal courts, which were more familiar with North Carolina law. The lower courts had found that the ordinance had not created a property interest. Deferring to this conclusion, Justice Stevens held that the plaintiff's discharge did not trigger the protections of due process. 426 U.S. at 345-47.

Bishop demonstrates that the due process implications of a state statute or similar legal enactment cannot be judged merely upon its face. Rather, this Court must look to the existing state judicial interpretations. Furthermore, an "authoritative interpretation" issued by a state court of last resort is conclusive on the issue of whether the enactment creates a property interest.

In the matter now before the Court, the very act of the Pennsylvania Supreme Court which withdrew what it conceded to be the erroneous Opinion of August 31, 1987 and which ruled in favor of Respondent constituted an "authoritative interpretation" of the Pennsylvania Rules of Appellate Procedure. This interpretation conclusively established that, under Pennsylvania law, the Petitioners never had a final judgment. The absence of a final judg-

ment, in turn, necessarily establishes the absence of a property interest and, thus, discredits the entire due process argument.

To reach a contrary conclusion, this Court would have to overturn the Pennsylvania Supreme Court's interpretation of its own procedural rules. Such a result would flout not only *Bishop*, but also the more recent decision by this Court in *Pennzoil Co. v. Texaco*, 481 U.S. 1 (1987).

Pennzoil considered whether a Texas rule of procedure violated the Due Process clause by requiring the posting of an excessively large bond. There were no clear precedents as to whether a Texas court might cure the potential constitutional problem by waiving the bonding requirement in the case where the appellant lacked the money to secure a bond. The lower federal courts found that no such exception could be recognized by the Texas courts, because the governing rule of civil procedure ". . . lists no exceptions to requirement that an appellant file a bond to suspend execution of a money judgment pending appeal." 481 U.S. at 16 n.15. In reversing, this Court admonished that federal judges "cannot assume that the Texas courts would not refuse to construe the rule, or to apply their inherent powers" in a manner which would prevent an unconstitutional result. *Id.*

Pennzoil is fatal to the Petitioners' claims. The case establishes that federal judges must permit state courts to conclusively interpret their own procedural rules, and must recognize that state courts have "inherent" powers to interpret those rules in ways that go beyond the mere text of the rules. A major purpose of this deference is to allow state courts to interpret their own laws in a way to avoid constitutional problems.[4] In accordance with this principle, this Court should accept the Pennsylvania Supreme Court's construction of its own rule.

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[4] See Rule 128, Pennsylvania Rules of Civil Procedure.

Page six of the Petition cites several cases for the proposition that "[s]tate court decisions may violate substantive due process . . ." in some situations. None of these cases undermines the conclusion that the Pennsylvania Supreme Court's interpretation of its own rules is final and binding for purposes of due process analysis.

Both long standing Pennsylvania Supreme Court precedent and the Pennsylvania Rules of Appellate Procedure clearly establish that no final judgment had been rendered by the Pennsylvania Supreme Court when that court acted upon Respondent's Application for Reconsideration *Nunc Pro Tunc* or its Amended Application for Reconsideration *Nunc Pro Tunc*. The Pennsylvania Supreme Court has held that an appellate judgment is not "final" as long as the record remains in the Supreme Court. *Star v. Bradford*, 2 P. & W. 384, 398 (Pa. 1831) ("[A]s long as it remains in the Supreme Court, the action is still pending.")[5] Here, the record remained in the Pennsylvania Supreme Court at the time the August 31, 1987 "judgment" was vacated and withdrawn. The record was not remanded by the Pennsylvania Supreme Court until January 12, 1989.

Thompson v. Louisville, 362 U.S. 199 (1960) is not even arguably relevant. In *Thompson*, this Court reversed a criminal conviction for lack of evidence. The case did not deal with whether state law creates a property interest.

Moreover, Petitioners readily admit that their remaining citations are dicta in very old cases. All of these decisions pre-date *Bishop v. Wood*, *supra* and, thus, are

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[5] Despite the age of the *Star* decision, the principle announced in that case retains vitality in more recent Pennsylvania cases. *See, e.g., Commonwealth v. Ballard*, 292 Pa. Super. 129, 436 A.2d 1039 (1981) (computation of time period for purposes of speedy trial rules commences from date of remand of record by appellate court to trial court); *Commonwealth v. Brady*, 37 D. & C. 3d 359 (Northumberland Cty. 1985) (same).

not persuasive to the extent that they suggest anything to the contrary.

Finally, on pages 4-5 of the Petition, Petitioners cite several Pennsylvania and federal cases for the proposition that the Pennsylvania Supreme Court could not reverse its original judgment against Respondent. Each of these cases are easily distinguishable.

In *Ladner v. Siegel*, 298 Pa. 487, 148 A. 699 (1930), the plaintiffs challenged a state court's decision to modify an existing injunction which the plaintiffs had previously obtained. The plaintiffs argued that the judgment granting the injunction constituted property which could not be taken from them under the Fourteenth Amendment. The Pennsylvania Supreme Court disagreed, reasoning that the plaintiffs had no "vested" property right in the continuation of the injunction because, under state law, state courts have the power to modify that judgment. 298 Pa. 498-500, 148 A. at 703-04. *Ladner* is fully consistent with the matter now before the Court, where the Pennsylvania Supreme Court has found that the August 31, 1987 judgment could be reconsidered under state law and the court's procedures.

Tradesmen's National Bank v. Floyd, 156 Pa. Super. 141, 39 A.2d 728 (1944), merely involved a situation where the Superior Court affirmed a trial court's refusal to re-open a judgment, noting that the "equities of the case" prevented such a result. 156 Pa. Super. at 151, 39 A.2d at 733. *Floyd*, moreover, long predates Rule 105(a) of the Pennsylvania Rules of Appellate Procedure —the rule of appellate procedure which authorized the Pennsylvania Supreme Court to reconsider the present case. *Floyd* is simply irrelevant to the Pennsylvania Supreme Court's right to recall a judgment in this situation.

Pennsylvania Co. v. Scott, 346 Pa. 13, 29 A.2d 328 (1942) is another inapposite citation. That case upheld

the constitutionality of the Pennsylvania Deficiency Judgment Act. *Scott* does not question a state court's right to reconsider a judgment and does not involve facts bearing any similarity to those in the matter now under consideration.

The federal authorities cited by Petitioners are similarly irrelevant and unpersuasive. *Evans v. Chicago*, 689 F.2d 1286 (7th Cir. 1982) held that a municipal government could not impair the value of state court judgments through late payment. It was undisputed that the judgments were final under state law, and the defendants never argued that the municipal government had any power under state law to change the judgments. *Evans*, therefore, has no application here where the state's highest court has held that the judgment in question was not final under state law.

The remaining federal citations, which concern the right of Congress and state legislatures to modify the scope of legal remedies, are specious for the same reason. *In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1076 (1988); *Hammond v. United States*, 786 F.2d 8 (1st Cir. 1986); *Greyhound Food Management v. City of Dayton*, 653 F.Supp. 1207 (S.D. Oh. 1986), *aff'd and remanded*, 852 F.2d 866 (6th Cir. 1988).

III. The Pennsylvania Supreme Court's Decision Was Correct As A Matter Of State Law.

In withdrawing its original ruling, the Pennsylvania Supreme Court was careful to deliniate and discuss in detail both the authority and factual basis for its decision. It acted pursuant to Rule 105(a) of the Pennsylvania Rules of Appellate Procedure. That section must be read in conjunction with Rule 105(b), which is incorporated by reference.

The plain language of 105(a) empowers the Pennsylvania Supreme Court to modify *all* Rules of Appellate

Procedure except for those specifically excluded by subsection (b). The reconsideration extended to Respondent in this case by the Pennsylvania Supreme Court had nothing to do with procedures in subsection (b), as the recall of the original Opinion did not enlarge the time for filing a "notice of appeal, a petition for allowance of appeal, a petition for permission to appeal, or a petition for review." Therefore, Rule 105(a) explicitly authorized the Pennsylvania Supreme Court's action and the Petitioners have no basis for claiming a "property interest" in a contrary result.

The Pennsylvania Supreme Court's Opinion which ruled in favor of Respondent cited several precedents for the proposition that 105(a) sanctioned the decision to grant reargument. Petitioners argue that all of these cases are irrelevant (Petition, p. 6 n. 5). Their attempt to distinguish these cases misses the point. Petitioners are attempting to establish that the Pennsylvania Supreme Court lacks the *power* to apply the broad discretion authorized by Rule 105 in the manner that it was implemented. To prevail upon such an argument, Petitioners must be required to present convincing authority for narrowing the open-ended language of Rule 105. No such authority has been presented—only Petitioners' bare assertion that the Pennsylvania Supreme Court's action was "arbitrary." It is most respectfully submitted that this Court should not disturb the Pennsylvania Supreme Court's decision.

Furthermore, the cases cited by the Pennsylvania Supreme Court fully support its prerogative to withdraw the original judgment against the Respondents. *In re Estate of Ciaffoni*, 498 Pa. 267, 446 A.2d 225, *cert. denied*, 459 U.S. 1036 (1982) is directly on point. *Ciaffoni* involved the challenge to a ruling of an orphans' court which upheld the validity of a probated will. The appellants argued that the orphans' court had erred by excluding evidence of fraud. The Pennsylvania Supreme

Court affirmed and subsequently denied reargument. Under Petitioners' theory, the litigation should have ended at that time.

The *Ciaffoni* appellants, however, moved for a new trial, and, when their motion was denied, filed a new appeal. The Pennsylvania Supreme Court accepted jurisdiction, explaining that "[w]e shall treat this matter as an application pursuant to Pa. R.A.P. 105(a) for modification of the Rules of Appellate Procedure to allow a second application for reargument." 498 Pa. at 269, 446 A.2d at 225. Upon reviewing the record, the *Ciaffoni* court stated that it was "convinced that the excluded wills were properly offered in support of appellants' claim that the pages of the challenged will had been fraudulently substituted." 498 Pa. at 270, 446 A.2d at 226. The court thereupon vacated its original order affirming the decree of the orphans' court, vacated the decree of the orphans' court and remanded the record for proceedings consistent with that opinion.

Petitioners attempt to distinguish *Ciaffoni* on the theory that the "case did not involve, as does this one, a final judgment at law for money damages, and the Court emphasized that there has, as yet, been no final distribution pursuant to the probated will." (Petition, pp. 6-7 n. 5). This logic is specious. The Pennsylvania Rules of Appellate Procedure draw no distinction between the finality of a "judgment at law for money damages" and a judgment in favor of a successful defendant in equity. However, as it is construed, *Ciaffoni* graphically demonstrates that Rule 105(a) of the Pennsylvania Rules of Appellate Procedure grants to the state court the discretion to reconsider an ostensibly "final" judgment. As a consequence, Petitioners have no "property interest" under state law which was divested in this case.

Petitioners also misinterpret *Dozor v. Rosenberg*, 431 Pa. 321, 246 A.2d 330 (1968). There, the plaintiffs originally obtained a judgment from a court of common

pleas which consisted of both an injunction and an award of monetary damages. In a ruling issued on March 22, 1966, the Pennsylvania Supreme Court affirmed the injunction, but ordered a new trial on damages. A petition for reargument was denied. "Sometime thereafter," the Pennsylvania Supreme Court *sua sponte* ordered reargument on the issue of damages, overturned its previous determination, and affirmed the lower court's damage award. 431 Pa. at 323, 246 A.2d at 331.

Petitioners claim that *Dozor* is distinguishable, because "[b]y granting reargument, the Court merely finalized the judgment which would otherwise have still been open." (Petition, pp. 6-7 n. 5). The meaning of this contention is, at best, unclear. In any event, *Dozor* offers additional authority demonstrating that the Pennsylvania Supreme Court possesses the power under state law to reverse prior determinations, even when the normal time for seeking reargument has expired. Moreover, *Dozor* totally discredits the contention that the Petitioners have been deprived of rights under state law.

Finally, Petitioners assert that "[t]wo of [the cases cited by the Pennsylvania Supreme Court] were criminal cases, decided in favor of the defendant, which are irrelevant to this case since no property right of the Commonwealth was infringed. *Commonwealth v. Swanger*, 453 Pa. 107, 307 A.2d 875 (1973); *Commonwealth v. Blair*, 470 Pa. 598, 369 A.2d 1153 (1977)." (Petition, p. 6 n. 5). This rationale fails for two reasons.

First, in *Swanger*, the Pennsylvania Supreme Court granted an untimely motion to reargue an opinion which had been issued in favor of the *defendant*. Therefore, the case adds further support for the conclusion that, under Pennsylvania law, a private litigant's "property interest" in a judgment is subject to the Supreme Court's right to order reargument, albeit at a time after the ordinary deadline for review has expired. Second, the entire question of whether the Commonwealth has a "property in-

terest" is a *non-sequitor* because Pennsylvania appellate procedure has never distinguished the Commonwealth from private litigants for purposes of determining the finality of judgments.

As explained earlier, Pennsylvania Courts have historically enjoyed the right to order the type of reargument that was ordered here. Consequently, Petitioners have no basis for challenging the Pennsylvania Supreme Court's "power" to act as it did in this case.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari to the Pennsylvania Supreme Court should be denied.

Respectfully submitted,

THOMAS W. JENNINGS
Counsel of Record
WILLIAM J. EINHORN
SAGOT & JENNINGS
11th Floor
Public Ledger Building
Philadelphia, PA 19106
(215) 351-0612
Attorneys for Respondent